Office-Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1925

# In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES DEPARTMENT OF STATE AND
GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONERS

*v.*

THE WASHINGTON POST COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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1. Respondent essentially ignores the issue presented in this case: whether Congress, when it amended Exemption 3 of the Freedom of Information Act in 1976, intended implicitly to repeal the statutory authorization for the Secretary of State to account for certain specified funds solely by certificate and on that basis to maintain the confidentiality of such funds. It is clear that Congress did not so intend.

As we explain in the certiorari petition (at 2-3, 19), the statutory authorization for such certificate accounting and confidentiality is rooted in and is nearly as old as the Constitution, and other appellate decisions have insisted on a clear showing of congressional intent before concluding that longstanding traditions of confidentiality have been abandoned by the general terms of Exemption 3. But if there could be any doubt about the congressional intent in this

case, it is dispelled by Congress' action since the amendments to Exemption 3 were enacted in 1976. For each of the three fiscal years involved in this case — 1977, 1978 and 1979 — Congress included a provision in the annual appropriation act for the State Department expressly authorizing the Secretary to account by certificate for the expenditures at issue here (Pet. 4 & n.2). Congress cannot be presumed to have regarded these enactments as empty gestures, under which the certificate would carry no independent force and public disclosure of the certificated expenditures instead would be governed by the FOIA.[1] Furthermore, in 1980, when Congress enacted legislation permitting the Comptroller General to conduct a limited audit of the Emergency Fund, it reaffirmed that the expenditures involved are confidential and stressed that the results of the audit could be disclosed only to the President, to the head of the agency concerned and, in limited circumstances, to appropriate congressional committees (see Pet. 6). The Congress that placed such stringent restrictions on disclosure of confidential audits by the General Accounting Office surely did not intend to permit a public audit of the same expenditures by the *Washington Post*.

Respondent ignores these factors. It does not even mention the constitutional roots of the statutes involved and the longstanding tradition of confidentiality for the very records to which it seeks access. Nor does respondent offer any explanation why Congress might have wished to overturn that practice when it amended Exemption 3 in 1976, and it does not address the significance of the post-1976 appropriation acts showing that Congress in fact intended to

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[1]Since the certiorari petition was filed, the Senate Foreign Relations Committee reported a bill (S. 1342, 98th Cong., 1st Sess. (1983)) to authorize appropriations for foreign relations matters that would clarify the purposes of the Emergency Fund and confirm that these expenditures are "confidential" in nature. S. Rep. No. 98-143, 98th Cong., 1st Sess. 25 (1983).

continue the prior practice. Respondent has, in short, wholly failed to answer the overwhelming indicia of congressional intent that the Secretary be permitted to maintain the confidentiality of certificated expenditures and records pertaining thereto.[2]

2. Instead of considering the problem in its proper historical and statutory context, respondent approaches the case as if the purpose of the inquiry were to grade Congress on its ability to draft a statute that satisfies some abstract standard of particularity, without regard to Congress' actual intent. But even on its own terms, respondent's argument is without merit.

First, respondent contends (Br. in Opp. 11-14) that the statutes at issue here do not satisfy Exemption 3 because they do not embody a formula to govern the Secretary's discretion whether to disclose information. Exemption 3, however, applies to matters specifically exempted from disclosure by a statute that either "establishes particular criteria for withholding *or* refers to particular types of matters to be withheld." 5 U.S.C. 552(b)(3) (emphasis added). Thus, even when no criteria for withholding are contained in the statute in question, the records are covered by Exemption 3 if the statute refers to "particular types of matters" to be withheld. Here, the governing statutes — 22 U.S.C. 2671, 31 U.S.C. 107, and the annual appropriation acts — are quite "particular" in their reference to the types of matters to be withheld: they permit withholding only of records pertaining to expenditures from a specific annual appropriation,

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[2]Respondent does assert that it is no concern of this Court whether "it 'makes sense' to impose restrictions on access to documents on another branch of government that are not imposed on the public at large" (Br. in Opp. 17 n.22). But the issue here is the proper construction of various statutes, including Exemption 3 of the FOIA, and it is well settled that a statute should not be construed to produce absurd results. See *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543 (1940).

limited in amount to far less than 1% of the annual appropriation for foreign affairs, for unforeseen emergencies arising in the diplomatic and consular service. Contrary to respondent's suggestion (Br. in Opp. 9-10, 13-14), this is not a case in which a broad range of information in the agency's possession might be swept into the exemption. Compare *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975), and *American Jewish Conference* v. *Kreps*, 574 F.2d 624, 628-629 (D.C. Cir. 1978).

The fact that Congress allowed the Secretary residual discretion to disclose some information *within* that narrow category does not detract from the particularity with which Congress has identified the category. See *DeLaurentiis* v. *Haig*, 686 F.2d 192, 194 (3d Cir. 1982); *Irons & Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), cert. denied, 444 U.S. 1075 (1980). Moreover, disclosures regarding the Emergency Fund have been rather rare, so that in practice, as Congress understood when it enacted the 1980 GAO Act (see Pet. 6-7), the expenditures from this and other certificated accounts traditionally have been regarded by all concerned as confidential.[3]

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[3]Respondent also contends that the Secretary has "unfettered discretion" to determine whether an expenditure should be allocated to the Fund in the first place and that there are no "limitations" on the types of matters for which the Fund may be used. See Br. in Opp. 14. This argument is misplaced. First, review of the substantive determination whether the Emergency Fund should be used for a particular expenditure is not the function of an FOIA suit, and respondent does not have standing to raise an objection to a particular use of the Fund. The question in this FOIA suit instead is whether respondent is entitled to receive records of whatever expenditures actually were made from the Fund. Second, there are in fact significant limitations on the use of the Fund. The most obvious is the amount of money Congress has appropriated for it. But in addition, the Fund has not been made available to sustain on-going State Department programs; it serves a supplementary, contingent purpose.

Second, contrary to respondent's contention (Br. in Opp. 14-16), the decision below cannot be reconciled with the decisions by the courts of appeals according Exemption 3 status to other statutes. For example, the statutes applicable to the National Security Agency and Central Intelligence Agency broadly permit withholding of any information about the "organization or any function" of the NSA, the "organization" and "functions" of CIA employees, and "intelligence sources and methods." 50 U.S.C. 402 note, 403(d)(3) and 403g. Unlike the provisions involved in this case, these statutes have an agency-wide sweep. Yet as respondent acknowledges (Br. in Opp. 15-16), the courts have respected the clear congressional purpose reflected in these statutes and held them to be covered by Exemption 3. There is no basis for a different result here.

3. As we explain in the certiorari petition (Pet. 21-22), other federal courts have held that a separate system of disclosure and exemption narrowly focusing on a discrete category of information must in any event take precedence over the more general provisions of the FOIA, at least where, as here, Congress has enacted laws after the 1976 amendments to Exemption 3 of the FOIA that provide for the confidentiality of the matters in question. See, *e.g.*, *King* v. *IRS*, 688 F.2d 488 (7th Cir. 1982); *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979). Since the certiorari petition was filed, another court of appeals has taken the same position. *White* v. *IRS*, 707 F.2d 897, 900 (6th Cir. 1983). A fortiori that analysis applies in this case, which involves a separate statutory system of disclosure and withholding rooted in the Constitution itself.

Respondent nevertheless suggests (Br. in Opp. 19) that there is no conflict between the decision below and *White*, *King* and *Zale* because the latter cases also held that the tax return information statute at issue in those cases is an

Exemption 3 statute. But that was only an alternative holding in each case. The court also held in each that, *quite aside from the application of Exemption 3*, the standards for disclosure under 26 U.S.C. 6103 must control. *White* v. *IRS, supra*, 707 F.2d at 900; *King* v. *IRS, supra*, 688 F.2d at 495; *Zale Corp.* v. *IRS, supra*, 481 F. Supp. at 488-491. There thus is a circuit conflict regarding the status of such distinct statutory disclosure and withholding schemes.[4]

4. Respondent errs in contending (Br. in Opp. 8-9) that the Court should deny certiorari because the court of appeals did not actually order the release of any documents but instead remanded for a determination of whether other FOIA exemptions might apply. In *FAA Administrator* v. *Robertson*, the court of appeals likewise had rejected the government's Exemption 3 argument but remanded for consideration of other exemptions the agency might wish to assert (see 422 U.S. at 260), and the respondent contended

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[4]Respondent also attempts to distinguish *White*, *King* and *Zale* by contending (Br. in Opp. 19-20 n.23) that there is no conflict between the 1980 GAO Act and FOIA because, in its view, the 1980 Act permits the preservation of the confidentiality of only those certificated expenditures that are exempt from disclosure under FOIA. This argument fails for three reasons. First, respondent cites nothing in the text or legislative history of the 1980 Act to suggest that Congress intended to engraft such an implied limitation on the long-established certificate accounting procedure, and we are aware of nothing to support such a result. To the contrary, the plain wording of the 1980 legislation broadly protects from disclosure the "findings of [the] audit" or "any books, documents, papers, records, or other information concerning such expenditure" (31 U.S.C. (Supp. V) 67(f)(2), to be recodified at 31 U.S.C. 3524(a)(2)). Second, the holdings in *White*, *King* and *Zale* were not dependent upon a finding of a direct conflict between 26 U.S.C. 6103 and FOIA (in each case, the court found that the tax statute was covered by Exemption 3). The courts simply found a congressional intent to establish a distinct system of disclosure and withholding for tax return information. Third, the argument in this case does not depend on the 1980 Act alone. For each of the fiscal years in question, Congress also enacted a provision in an appropriation act specifically providing for certificate accounting and corresponding confidentiality.

that the case therefore was not ripe for review (Mem. in Opp. 12, No. 74-450 (1974 Term)). The government answered by noting that the court of appeals had issued a definitive interpretation of Exemption 3 that would control in the District of Columbia Circuit, where much FOIA litigation is concentrated, and that the Exemption 3 issue would not be affected by proceedings on remand (Reply Mem. 3, No. 74-450 (1974 Term)). The Court granted certiorari to consider the Exemption 3 issue in *Robertson*, and the same considerations warrant review here.[5]

But there is an additional reason why review is appropriate in this case. The system of confidentiality Congress has established for the State Department's Emergency Fund and other similar funds was intended to avoid any occasion for anyone other than the certifying official to look behind the certification, which Congress expressly deemed a "sufficient voucher" for the sum expended. 31 U.S.C. 107. The inquiry into the details of individual expenditures contemplated by the court of appeals' remand to determine whether other FOIA exemptions might apply therefore is itself inconsistent with the congressional judgment that the certification is a sufficient voucher. The integrity of the certification procedure should not be breached in this fashion until this Court has had an opportunity to consider whether the absolute protection Congress long intended for certificated expenditures has been displaced by the 1976 amendments to Exemption 3. The decision below not only directly affects the State Department's Emergency Fund; it also may jeopardize the integrity of certificate accounting for other expenditures.

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[5]More recently, the Court granted certiorari in *FTC* v. *Grolier, Inc.*, No. 82-372 (June 6, 1983), even though the court of appeals had remanded for further proceedings without actually ordering the disclosure of documents. 671 F.2d 553, 557 (D.C. Cir. 1982).

For the foregoing reasons and the additional reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
*Solicitor General*

SEPTEMBER 1983

DOJ-1983-09